Atty Gen. Op. No. 11 - IIB13

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August 29, 2011

BY FACSIMILE AND U.S.MAIL
John W. Paradee, Esquire
Prickett, Jones & Elliott
11 North State Street
Dover, DE 19901

RE: Freedom of Information Act Complaint Against City of Dover

Dear Mr. Paradee:

On or about July 18, 2011, you asked for an Attorney General's determination as to whether the City of Dover ("City") violated the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA") by refusing to provide you with an unredacted copy of an April 22, 2010 contract the City entered into with White Oak Solar Energy, LLC ("White Oak"), for purchasing solar energy. ("Contract"). With the City's consent, LS Power Group ("LS Power"), of which White Oak is a member, responded to your complaint. This is the determination of the Delaware Department of Justice pursuant to 29 *Del. C* § 10005(e).

FACTS

The Contract provides that White Oak will establish a solar photovoltaic electric generating facility within the City of Dover and sell to the City the solar energy the facility produces. The Contract also provides the City will buy from White Oak the Renewable Energy

Credits and Environmental Attributes generated by the facility's production of solar energy.[1] By letter dated April 4, 2011, you requested the City provide you with, among other records, the Contract. What the City ultimately provided on May 6, 2011, was a document that redacted[2] the finance rate (¶ 1.4), the Daily LD [liquidated damages] Amount (¶ 4.1(D)), liquidated damages (¶ 4.1(E)), and Schedules I and II, showing the payment rates for solar energy and Environmental Attributes, and the "Solar Energy Payment Rate Adjustment."[3] The City justified its redactions on the grounds that it withheld protected confidential commercial or financial information. LS Power claims that the solar power market is "very competitive . . . with many companies seeking to obtain long-term contracts for the sale of electricity and renewable energy credits." It asserts that "disclosure of the pricing information from the [Contract] will give [LS Power's] competitors enough information to underbid LS Power, which will have a material adverse effect on LS Power's ability to sell electricity and renewable energy credits[.]."

RELEVANT STATUTES

A public body must make public records reasonably available to the public. 29 *Del. C.* § 10003(a). "Public record" does not include "commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 *Del. C.* § 10002(g)(2).

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[1] Renewable Energy Credits, defined in 26 *Del. C.* § 352(18), and Environmental Attributes are renewable resource tradable credits.

[2] We note that the redactions in the final Contract are white outs—blank white spaces that are extremely difficult to locate in the document. While FOIA does not stipulate how documents should be redacted, it is not appropriate to use a method that does not identify where deletions have been made.

[3] The Solar Energy Payment Rate Adjustment is a factor that adjusts the Solar Energy Payment in Schedule I.

DISCUSSION

There is no dispute that the numbers deleted from the Contract when the City provided it to you are commercial or financial information within the meaning of § 10002(g)(2). The questions, then, are whether the numbers in dispute are "obtained from a person" and if so, whether they are "privileged or confidential." The first hurdle the City must overcome is whether the numbers were "obtained from a person;" that is, whether a person or entity outside of the government provided the allegedly confidential information to the government. *Gulf and Western Indus. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979).

LS Power asserts that the Contract was entered into after "extensive negotiations, including regarding the rates that White Oak would charge the City." One District of Columbia federal district court has found that negotiated terms that originated with the non-government contracting party do constitute information obtained from a person and are protected by Exemption 4 of federal FOIA, 5 U.S.C. § 552 (b)(4). *Public Citizen Health Research Group v. Nat'l Institutes of Health*, 209 F.Supp.2d 37, 44 (D.D.C. 2002). While we rely on federal court interpretations of Exemption 4 because it is essentially identical to § 10002(g)(2), we are not bound by holdings outside of Delaware, and in this case, we reject *Public Citizen* as incorrectly reasoned.

Even if we assume that White Oak was the first source of the numbers that were then negotiated into a final agreement, we do not find such factual line-drawing to be persuasive. *Public Citizen* reasoned that because in order to do business with the government a person is required to submit a proposal, the final contract terms should be subjected to the two part *National Parks* test: whether "disclosure . . . is likely . . . (1) to impair the government's ability

to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, we find that negotiated final terms are not "obtained from a person," regardless which party lobbed the first numbers into the negotiation.

Moreover, there is nothing about the redacted numbers that could reveal confidential information about White Oak. This is not a situation where public knowledge of contract information will enable competitors to figure out confidential information, as in *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 306 (D.C. Cir. 1999). Rather, this is a bottom line contract price case, in which nothing that has been redacted reveals anything about the negotiations or the underlying information that White Oak used to arrive at the final price terms. Certainly, White Oak would prefer its competitors not to know any of the contract terms; but government contracting is subject to FOIA and the public's right to know how the government operates. *McDonnell Douglas*, moreover, was a "unit price" case, in which the contract information included "cost figures for specific launch service components and overhead, labor rates, and profit figures and percentages." *Id.* at 304. None of the figures redacted from the Contract describe White Oak's business at all, let alone with that level of depth. Again, we find that the bottom line contract price is not protected.

Judge Tatel, constrained by settled law in the D.C. Circuit to concur with the majority opinion that protected line item pricing information in a government contract, nonetheless made the following trenchant analysis:

> [G]iven that FOIA"s primary purpose is to inform citizens about 'what their government is up to,' *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), it seems quite unlikely that Congress intended to prevent the public from learning how much the government pays for goods and services. Moreover, [the government] would prefer to disclose contract . . . prices because in a competitive bidding environment such information may well save money for the government and the taxpayers who fund it. By contrast, entities whose interest lie in charging government agencies as much as possible, or in preventing others from charging less for the same services, would prefer to keep such data confidential.
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> Thus, applying the *National Parks* competitive harm test to agreed-upon prices in government contracts may bar disclosure of such prices in the very situation in which the public interest in disclosure is at its apogee.

Canadian Commercial Corp. v. Air Force, 514 F.3d 37, 43 (D.C. Cir. 2008) (Tatel, J., concurring); *see also McDonnell Douglas Corp. v. Air Force*, 375 F.3d 1182, 1194-1203 (D.C. Cir. 2004) (Garland, J., dissenting).

CONCLUSION

For the reasons stated above, we conclude that the City violated FOIA when it redacted terms from the Contract. The City should provide you with a complete, unredacted copy of the Contract within five business days of the date of this letter.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

cc: David Sass, Senior Counsel, LS Power Development, LLC (by facsimile and U.S. Mail)
Traci McDowell, City Clerk (by facsimile and U.S. mail)